

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL WITH AFFIDAVIT OF
MAILING

77-1332

United States Court of Appeals

For the Second Circuit

Docket No. 77-1332

UNITED STATES OF AMERICA,

Appellee,

-against-

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC and FRANE PESUT,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**PETITION ON BEHALF OF APPELLANTS
FRANE PESUT and PETAR MATANIC FOR
REHEARING AND SUGGESTION FOR
REHEARING IN BANC**

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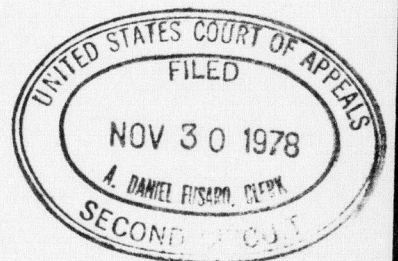


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PETITION ON BEHALF OF APPELLANTS
FRANE PESUT AND PETAR MATANIC
FOR REHEARING AND SUGGESTION FOR
REHEARING IN BANC

On October 30, 1978, a majority of the panel which heard argument in this case (Feinberg, Timbers and Lumbard, J.J.) affirmed the convictions of appellants Pesut and Matanic for the skyjacking of a TWA flight in September, 1976, from LaGuardia Airport in Queens, New York and the resulting 30-year prison terms imposed on each. Judge Lumbard dissented from the affirmance of Pesut's and Matanic's convictions on the ground that the summations of their counsel "...were inexcusably interrupted by the court and by government counsel on so many occasions and in such a manner that the presentation of their defenses to the jury was seriously prejudiced"

(Slip op. 5025). Accordingly, Judge Lumbard found that "counsel for Matanic and Pesut were deprived of a fair opportunity to argue their clients' case to the jury, a right guaranteed to the defendants by the Constitution" (Slip op. 5034). The majority, however, having found no prior case in which the prejudicial interruption of a defense summation was cause for reversal, affirmed the convictions. The majority also concluded that the more than 50 interruptions of counsels' back to back summations did not amount to an "excessive series of patently unwarranted interruptions" (Slip op. 5046).

In this petition, appellants Pesut and Matanic raise only those issues which involve the claim of judicial bias and hostility, issues that meet both standards for rehearing in banc: Consideration of the full Court is necessary to secure or maintain uniformity of its decisions and because the questions presented are of exceptional importance.

ARGUMENT

THE PER SE DOCTRINE RELIED UPON BY THE MAJORITY OPINIONS IS CONTRARY TO THE PRIOR DECISIONS OF THIS COURT, IT UNDERMINES THE INTENDED PURPOSE OF RULE 29.1, F.R.Crim.P. AND IF UNCORRECTED WILL INEVITABLY ALTER THE PROPER AND HERETOFORE ACCEPTED BALANCE IN THE SUPERVISION OF PROSECUTION AND DEFENSE SUMMATIONS.

- A. THE APPLICATION OF A PER SE RULE TO THE TRIAL JUDGE'S INTERRUPTIONS OF THE SUMMATIONS HAS NO PRECEDENT IN THIS CIRCUIT.

In United States v. Nazzaro, 472 F.2d 303 (2d Cir. 1973)

Chief Judge Kaufman (then Judge) observed that

... a judge's participation during trial -- whether it takes the form of interrogating witnesses, addressing counsel or some other conduct-- must never reach the point at which it appears clear to the jury that the court believes the accused is guilty. (emphasis added)

Despite the underscored language, the majority emphasizes the absence of a prior case "in which a trial court's supervision of summations has alone been held to constitute a denial of effective assistance of counsel" (Slip op. 5045) (Feinberg, J.).^{1/} It goes without saying that this Court has never considered it appropriate, in cases involving claims of judicial bias or hostility, to segment a trial and, upon such an artificial segmentation, apply varying standards of judicial conduct. Thus, this Court had no hesitancy in reversing a criminal conviction because of the district judge's isolated bias shown in his interrogation of the defendant, United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970), or even upon a biased interrogation of defense witnesses, United States v. Fernandez, 480 F.2d 726, 736-738 (2d Cir. 1973).

In speaking of trial judges, this Court has stated that "... an appearance of impartiality and judicious detachment

^{1/} Judge Timbers states that appellants have not claimed that the emasculation of their counsel's summations was sufficient to reverse. That claim, however, was made. (Br. at 43)

must prevail at all times" (emphasis added). United States v. Nazzaro, supra, 472 F.2d at 313. "[A trial judge] must not interfere for a merely partisan purpose or permit even the appearance of such an interference" (emphasis added). United States v. Curcio, 279 F.2d 681, 682 (2d Cir. 1960). "[A trial judge] must take great pains to avoid giving the jury an impression that he is a partisan" (emphasis added). United States v. Persico, 305 F.2d 534, 540 (2d Cir. 1962). "He must not--- give the jury an impression of partisanship on either side" (emphasis added). United States v. DeSisto, 289 F.2d 833, 834 (2d Cir. 1961) "He must ... be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence." United States v. Brandt, 196 F.2d 653, 656 (2d Cir. 1952).

These standards, of course, reflect the Supreme Court's observation that a Federal trial judge's "influence..." is "necessarily and properly of great weight and 'his lightest word or intimation is received with deference, and may prove controlling'" (citation omitted) (emphasis added). Quercia v. United, States, 289 U.S. 466, 470 (1933).

The position of the majority ("No Court has ever held that a criminal conviction should be reversed solely because of interruptions by the Court or prosecutor during summations by defense counsel" [Slip op. 5050-51] [Timbers, J.]) neither stands up to reasoned analysis, let alone the prior decisions of this

Court which have consistently underscored the responsibility of trial judges to insure defendants a fair trial. Simply put, the standard articulated by the majority, that there be "an excessive series of patently unwarranted interruptions of ...closing argument" (Slip op. 5046) effectively nullifies the prior standards of judicial conduct carefully honed by this Court and the Supreme Court. "Appearance", "impression" and "intimation" have now been replaced by "patently unwarranted". Such a standard is unacceptable.

Aside from its stark departure from the heretofore existing standards governing trial judge's conduct, the per se doctrine invoked by the majority ignores the fact that this Court has never perceived, in cases involving the same kind of prejudice which flows from prosecutorial misconduct, that the prejudicial effect of the misconduct depends upon whether it arose out of events occurring during the course of the trial, e.g., United States v. Phingst, 477 F.2d 177 (2d Cir.), cert. denied, 412 U.S. 941 (1973), or during the summation phase of the trial. E.g., United States v. White, 486 F.2d 204 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974).

It makes no sense that the same type of prejudice, when it roosts in the defense summation, should not be scrutinized upon the same standard of review. Indeed, given the court's participation, the prejudice to a defendant is far worse when his counsel's summation is, as Judge Lumbard has observed here, turned into "a comedy of errors" by the court's and prosecutor's "nit-picking" (Slip op. 5031).

It is, therefore, completely beside the point that no prior case has appeared in which the defense summations have been emasculated by a trial judge. It happened here. And the shock of its occurrence ought and must not be the occasion for a relaxation of the Court's prior standard of review, a standard which has always been thought necessary to maintain "the high reputation of Federal criminal justice and the policy of complete and evenhanded fairness for the defendant...." United States v. Fernandez, *supra*, 480 F.2d at 738. Judge Bartels did not exhibit "...that detachment and aloofness which courts have again and again demanded, particularly in criminal trials." United States v. Marzano, 149 F.2d 923, 926 (2d. Cir. 1945) (L. Hand, J.)

B. THE MAJORITY OPINIONS IGNORE AND
UNDERMINE RULE 29.1, F.R.Crim.P.

The majority decision also undermines the intended purpose of Rule 29.1, F.R.Crim.P., which, in establishing that the government sum up first, was intended to permit the defense an opportunity to reply to the government's position and provide balance to the summation process.^{2/} See Generally, 8A Moore's Federal Practice, ¶29.1.01 et seq.

2/ The Advisory Committee note to the rule states:

This rule is designed to control the order of closing argument. It reflects the Advisory Committee's view that it is reasonable to have a uniform Federal Practice. The rule is drafted in the view that fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply. (Reported at 62 F.R.D. 319).

So important is the separate right to reply in summation, that this Court has repeatedly recognized, under the practice before Rule 29.1, that prosecutors could, in effect, "reply in kind". Thus, in United States v. White, 486 F.2d 204, 207 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974), Chief Judge Kaufman remarked that the "exceedingly fine line which distinguishes permissible advocacy from improper excess is to be drawn within the concrete terrain of specific cases." So, in United States v. Bivona, 487 F.2d 443 (2d Cir. 1973), this Court noted that a "defense barrage" on summation accorded "the prosecutor some range to respond" (emphasis added). In United States v. Benter, 457 F.2d 1174, 1177 (2d Cir.), cert. denied, 409 U.S. 842 (1972), this Court recognized that an "advocate is permitted considerable latitude in replying to his opponents' arguments" (quoting from United States v. Nowack, 448 F.2d 134, 140-141 [7th Cir. 1971], cert. denied, 404 U.S. 1039 [1972]). And, in United States v. LaSorsa, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973), a case in which the defense summed up first, this Court, in considering the prosecutor's otherwise improper statements on closing, stated that it was "manifest from even a casual reading of the jury arguments of defense counsel that the prosecution was only meeting the defense on a level of the defense's own choosing" and that the "prosecutor was certainly entitled to reply with rebutting language suitable to the occasion" (emphasis added). See also, United States v. Brawer, 482 F.2d 117, 134 (2d Cir. 1973), cert. denied, 419 U.S. 1051 (1974); United States v. Traumunti, 513 F.2d 1087, 1119 (2d Cir.), cert. denied, 423 U.S. 832 (1975). Surely, what is sauce for the goose must be sauce for the gander. But, as will shortly be

made evident, that was not the case here.^{3/}

In more general terms, this Court has recognized that "advocates may marshal all inferences that the evidence supports and indulge in non prejudicial flourishes of rhetoric. Eloquence is not misplaced in the courtroom". United States v. White, supra, 486 F.2d at 207. And there can be no question but that Schlam's summation, which Judge Lumbard has described in his dissent as a "five and a half hour harangue" in which he "spared no language in condemning the actions of the defendants" (Slip op. 5030) invited whatever comments the majority has viewed as "rhetorical excesses" (Slip op. 5045) (Feinberg, J.).

None of the opinions discuss the prosecutor's misstatements of fact which were set forth in Matanic's and Pesut's Brief (at p. 46 n 44, and 56-57, reproduced at A-1 through A-3, annexed hereto).^{3a/} Schlam's summation was replete with improper arguments which were never once commented upon or halted. We leave aside,

3/ We do not contend that a defense attorney should be allowed greater latitude in summation than the prosecutor. Nor, on the record of this case is there any necessity to justify the kind of defense misconduct which this Court spoke to in United States v. DeAngelis, 490 F.2d 1004, 1010-1012 (2d Cir.), cert. denied, 416 U.S. 956 (1974) (Mansfield J. concurring opinion); that is, the assertion of personal knowledge of a fact or the personal opinion on such matters as the credibility of witnesses or the innocence of a client. ABA Code of Professional Responsibility (1971), DR 7-106 (C)(3) and (4). There must, however, be equal treatment of advocates by the Court. Here, there was no such equality of treatment.

3a/ Point IV B of Julianne Busic's brief on appeal, "Julie was denied a Fair Trial by the Prosecutor's Improper Use in Closing Argument of Inadmissible Evidence and References to a Fabricated Defense", has not been addressed by the panel. While Matanic and Pesut did not separately urge that Schlam's summation required reversal, his persistent and often erroneous elaborations of the record and improper rhetoric, which passed unhindered to the jury, are clearly relevant in establishing that the entirety of the summation portion of the case deprived Matanic and Pesut of a fair trial. To that extent, therefore, we join in arguments advanced in the Petition for Rehearing filed by Julianne Busic.

in the following extract, the several misstatements and fanciful elaborations of the evidence, and concentrate solely on some of the rhetorical flourishes and tactics which, because they are "inconsistent with the duty of the prosecutor to 'seek justice, not merely to convict'" [citation omitted] United States v. White, supra 486 F.2d at 206, have been repeatedly cautioned against:

"So now, ladies and gentlemen, we come to the defendants, the defense case. They all testified" (T. 5313) "...gallantry will win for Mr. Busic a place, a permanent place in the book of Croatian heroes" (T. 5345). He's got to come up with something that is going to sound as plausible as he can in the hope that...maybe one juror will say, 'Mr. Zvonko, you're right. You're telling the truth. It was you by yourself all the way'" (T. 5347). "...a poor fellow like Mr. Matanic, all he wanted to do was go to Chicago for the secret meeting." (T. 5353) "...these poor guys..." (T. 5355) "...that's a pretty big one for somebody to swallow" (T. 5360). "...strategy of all the defendants to hide half-truths, quarter-truths, no-truths..." (T. 5362). "...you couldn't tell that story to a three year old and have that little baby believe it" (T. 5368); "...neither he [Busic] nor any of the co-defendants are going to admit one thing, unless they know beyond all doubt we can prove...if they make an admission on the stand, you can rest assured...that we have the information" (T. 5372); "...she [Julienne Busic] thinks that you're stupid..." (T. 5381); "...she thinks that she can bluff you..." (T. 5381); "...Captain Carey, I suggest made a good impression...I think he...related the events in as natural a way as he could. And he made a good impression" (T. 5383); "...before they [the defendants] had a chance to concoct and to mold..." (T. 5397); "He [Matanic] was right up there on the witness stand and with a straight face that was his testimony" (T. 5402); "...poor, unsuspecting Petar Matanic" (T. 5403); "...whether Mr. Matanic is telling you...a bald face lie" (T. 5403); He's [Matanic] had [the] opportunity to talk on numerous occasions with his co-defendants. He's got his testimony prepared...[and] rehearsed (T. 5404); "...[a] four-way fooling process..." (T. 5405); "Let's [speaking of the defendants] perpetrate the hoax one more step. We did it with the passengers, we sure should be able to do it with the jury." (T. 5406); "...this is what you're being asked to swallow here" (T. 5407); "...how does he [Matanic] expect that you are going

to...believe one word of that?" (T. 5411); "...the unmitigated gall in trying to feed you something that's diametrically, 180 degrees different from what really happened" (T. 5419); "...this poor chap [Pesut]" (T. 5416); "...poor Mr. Pesut..." (T. 5419); "...trying to determine whether Mr. Pesut is... lying" (T. 5420); "Some of the stuff [testimony] he [Pesut] can plan in advance with his co-defendants" (T. 5426); "That's the refrain that keeps coming back and back and back. We are not at fault. It's the victim that's at fault" (T. 5437).

Thus, counterpoised against Judge Bartels' massive interference with the defense summations, was his resounding silence throughout the prosecutor's five and a half hour summation. By not permitting Matanic's and Pesut's counsel an opportunity to reply, even if in kind, the court placed defense counsel in an untenable and prejudicial position. The intended purpose of Rule 29.1 was flouted in the extreme and defense counsel was never accorded the same latitude that this Court has allowed prosecutors.

C. THE EXTRAORDINARY DISCRETION ACCORDED BY THE MAJORITY TO THE TRIAL JUDGE'S SUPERVISION OF THE DEFENSE SUMMATIONS IS UNPRECEDENTED, IS UNFOUNDED IN THE RECORD AND, IF NOT REVERSED, WILL UNALTERABLY AND INEVITABLY SERVE TO PREJUDICE DEFENDANTS IN FUTURE TRIALS.

The majority opinions repeatedly refer to the supposed "broad discretion conferred on ~~the~~ trial judge to control the summations" (Slip op. 5051) (Timbers, J.).^{4/} And, in the abstract, that

^{4/} Plainly, there reaches a point -- as in this case -- when the concept of "discretion" "grates upon the ear" because "it is not overwhelmingly apt to describe what actually goes on." In Re Zeckendorf, 326 F.Supp. 182, 194 (S.D.N.Y. 1971) (Frankel, J.).

may be so. But none of the interruptions here came within the guidelines set forth in United States v. DeAngelis, supra. Nor were any of the interruptions of a class which are customarily employed by District Judges in the Eastern District of New York. Nor, we believe, in any district court under the supervision of the Second Circuit Court of Appeals. In a word, if Judge Bartels' "control" of these defense summations as evidenced in the appendix to Judge Lumbard's opinion, is now the standard by which defense summations will be measured in the future -- and government summations correspondingly uncontrolled -- then the Court has erected a horrible imbalance and one which, in fact, is at variance with a continuous practice in the Eastern District and, we submit, the Circuit. Moreover, as will be immediately shown, those interruptions which the majority found to be warranted were, in nearly every instance, totally unjustified and unprecedented.^{5/}

^{5/} Judge Lumbard found that the Court's "deliberate and frequent interruptions" (Slip op. 5031) were, in every instance "based on either the Court's misinterpretation of counsel's argument, its erroneous recollection of the evidence" or were "unnecessary or irrelevant" (Slip op. 5029).

In an effort to justify the trial judge's unprecedented invasion of the defense summations, Judge Feinberg has observed that Judge Bartels "...understandably grew somewhat irritable as the long day of summations progressed" (Slip op. 5047). The length of the court day, however, had been dictated by the judge the day before (T. 5182-83) and, even after Schlam had exceeded by two and a half hours his allotted time, the court still insisted on packing in as many defense summations as possible: "Ladies and gentlemen of the jury, I am sorry we have to have it this late, but as I see the way things are going, unless we do it now we will not finish even tomorrow" (T. 5571). Anyway, the fact that it was late in the day, at the end of a lengthy trial, was no excuse for the trial judge's conduct. "...[G]rave errors

The concurring opinions of Judges Feinberg and Timbers justify the district court's constant interruption of the summations, in part, on what Judge Feinberg has called "defense counsel's "rhetorical excesses" (Slip op. 5045) and Judge Timbers has labeled "provocative conduct" (Slip op. 5049). Judge Lumbard has spoken of the "serious presentation by responsible counsel" (Slip op. 5031).

Judge Timbers' assertion that counsel engaged in provocative conduct carries no supporting reference to any part of the record, let alone to anything which occurred during the summations. Judge Feinberg, however, in justifying "whatever curtness" the court displayed to Matanic's counsel (Slip op. 5044), sets forth two "examples", one of which occurred at the very beginning of Bergman's summation:

MR. BERGMAN: Your decision is supreme. You
are like the ancient kings. And, nobody, not
Judge Bartels ---

THE COURT: Just leave me out of this. I am not --

MR. BERGMAN: I will bring in the President of the
United States . . . (Slip op. 5043-44)

Simply put, the petulance evident in black and white did not occur at the trial. To begin with, the above quoted colloquy occurred at the tail end of counsel's remarks to the jury that it

which result in serious prejudice to a defendant cannot be ignored simply because they grow out of difficult conditions". United States v. Nazzaro, supra, 472 F.2d at 304.

was their "recollection of the evidence" which controlled, "not Judge Bartels', not mine, not Mr. Schlam's. Because you ladies and gentlemen are the exclusive judges of the facts in this case" (T. 5576-77). The colloquy then followed.

The remark about "bring[ing] in the President of the United States" was not in any sense uttered in a challenging or disrespectful way. In fact, as shown by trial counsel's summation notes (A-4, annexed hereto) the reference to the President of the United States had already been prepared by counsel. Not even government counsel, who was present at the summations, interpreted the comment as a challenge to the court or as displaying an "I'll show you" attitude. (Gov't Br. at 101 n. 71). And, obviously neither did Judge Bartels.

The second colloquy quoted in Judge Feinberg's opinion, which is offered to show that "[a]s the evening advanced ... some of the turbulence was undoubtedly due to Bergman" (Slip op. 5043), is as follows:

MR. ROCHMAN: My motion --

MR. BERGMAN: Your Honor --

THE COURT: No.

MR. BERGMAN: Yes, yes, yes. (Slip op. 5044)

But that colloquy occurred aft er the summations had been completed (T. 5679) and not before the summations, as implied. Also, as shown by the reporter's marks, it was an overlapping exchange

which, if it actually occurred in the perjorative manner that it appears in print, would surely have brought forth an immediate and justifiable rebuke from the court for its insolence. But there was no insolence, nor disrespect and not even the government saw fit to cite that colloquy as an example of counsel's supposed contemptuous conduct (Gov't Br. at 27).

Judge Feinberg has stated that at least ten of the forty-odd interruptions of Mr. Bergman's summation were appropriate "technical queries" (Slip op. 5044). Two of those "technical" inquiries, concerning who Bergman was representing, Matanic or Pesut, were needless, hardly "technical" and served only to emasculate a proper argument (T. 5657-58). Judge Bartels, although he inquired of the prosecutor as to time but once during the five and a half hour opening statement of the government, asked or commented upon the length of Rochman's and Bergman's summation no less than nine times (three for Rochman and six times for Bergman). In contrast, as to Schlam, the court finally and solicitously inquired during the fifth hour of what was supposed to be a three hour summation: "We are not going to repeat, are we?" (T. 5439).

Even the remaining two "technical queries" of Bergman were not without their prejudicial overtones. Thus, the court, in effect, asked Bergman to repeat his statement that, "...after he [Matanic] was forced into this, he considered himself a hijacker. Sure. He was." The following occurred:

THE COURT: What?

MR. BERGMAN: He considered himself a hijacker.

THE COURT: Oh. (T. 5623)

Coincidentally, the second "technical" inquiry by Judge Bartels served to momentarily freeze in the jury's mind a particularly damaging piece of evidence (the cockpit conversation involving Matanic, Vlastic and the co-pilot) which Bergman was trying to meet (T. 5639). And a reading of the record shows, as well, that there was no ambiguity at all justifying the "technical" interruption (T. 5638-39).

Finally, the majority opinion finds that Matanic and Pesut were not prejudiced by the district judge's interference because they were acquitted of the first count in the indictment. Judge Feinberg mentions that fact twice (Slip op. 5043, n 4, 5047) and Judge Timbers also relies on the acquittals (Slip op. 5050).

In United States v. Grunberger, supra, however, this Court came to no such conclusion, even though Grunberger had been acquitted of one of the charges against him. Grunberger, in fact, involves a situation parallel to the case at bar. There, an equally respected district judge engaged in extensive questioning of the defendant but hardly questioned the government's main accomplice witness. In reversing on grounds of the appearance of bias, this Court stated (431 F.2d at 1068):

"As a result of the Court's varying style of interrogating the prosecution's prime witness and the defendant, the jury might have received the impression that the judge believed Berger's version of the facts to be the more plausible of the two versions."

But more importantly, Pesut's acquittal of the first count and certainly Matanic's could not have had anything to do with Rochman's supposed "fluid and persuasive" summation (Slip op. 5043) (Feinberg, J.) or Bergman's "clearly effective" summation (Slip op. 5044) (Feinberg, J.).

As noted by the dissent, Pesut and Matanic had identical defenses. "Each testified that he had been invited to a political rally in Chicago and that after Zvonko Busic's takeover of the plane each had acted under Zvonko Busic's threats of death. The single issue raised by their defenses was whether each had intentionally participated in the aircraft piracy" (Slip op. 5030). Evidence showing their connection with the bomb was, in Pesut's case, tenuous at best and, in Matanic's, nonexistent. In fact, of the 100 pages of transcript of Bergman's summation, less than three pages were devoted to the first count (T. 5670-5672). In short, the acquittals on the first count can hardly be used as a gauge to measure the effect of the trial court's conduct.

But beyond the particulars of Judge Bartels' interruptions and their strained justifications lies the inescapable conclusion to those who are familiar with Federal criminal trials that no judge, certainly none sitting today, intrudes upon the defense

functions to the degree that Judge Bartels did in this case. To those who are familiar with practice of Federal judges, it is known that no reprimand will come on the heels of a defense allusion to the oft-quoted remark of Justice Sutherland in Berger v. United States, 295 U.S. 78, 88 (1935), nor that a Federal judge will strain to find perceived misstatements of the record when the prosecutor can take care of marginal or unintended misstatements on rebuttal. We daresay that a review of the last 50, the last 100, the last 1,000 trials conducted in this Circuit would show that no Federal trial judge has interrupted a defense summation with the frequency and for the picayune reasons that Judge Bartels did. Measured against that consistent practice, as well as the limitations implicit in United States v. DeAngelis, supra, Judge Bartels' exercise of discretion was the exercise of no discretion at all. As stated by Judge Friendly in a different context:

"The effect of such a continued and consistent course of decision is to narrow the allowable scope of discretion,...". Noonan v. Cunard Steamship Co., 375 F.2d 69, 70 (2d Cir. 1967).

Here, by giving the imprimatur to Judge Bartels' emasculation of defense summations which, really, were in all respects quite proper and in accord with long accepted standards, the balance has been upset. The Court has now set adrift a significant part of criminal trials, a part which has heretofore been in equipoise. The dangers may not be immediately evident but they

will inevitably and significantly affect the administration of criminal justice in this Circuit.

In conclusion, we wish to respond to the second footnote to Judge Timbers' concurring opinion (Slip op. 5049-50), which speaks of Judge Bartels' reputation.

Two men are now serving 30 year prison terms for a crime which, had they been tried in an impartial atmosphere, they might not have been convicted. And we say that without derogating Judge Timber's justifiable concern with the seriousness of the crime they have been charged with; but if in fact they are guilty, then they will be convicted again following an impartial trial. As to Matanic and Pesut, Judge Bartels consistently destroyed not only their credibility but the credibility of their attorneys. Judge Bartels' reputation is beside the point.

Certainly, we concede that the nature of this trial which, as Judge Feinberg has noted, was "fiercely litigated" (Slip op. 5047), required the most demanding of judicial resources. If on this occasion Judge Bartels was unable to command those resources, it must be acknowledged, with deference and respect for his reputation, but acknowledged nonetheless.

We beseech the majority of this Court, in the words of Cromwell, "think it possible that you may be mistaken." The life-^{6/}times of two men are in the balance.

(See footnote, page 19)

CONCLUSION

For the reasons set forth above, this petition for rehearing should be granted, and rehearing should be in banc. The opinion of the majority of the panel should be vacated and Matanic's and Pesut's convictions should be reversed.

Dated: New York, New York
November 27, 1978

Respectfully, submitted,

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6/ It must be noted that, even if there is some justification for the adoption of a per se rule respecting the supervision of defense summations, this is not the case for its adoption. There is no discussion in the majority opinions about the numerous instances of judicial bias that we claimed was exhibited by Judge Bartels from the very beginning of the trial. Nearly the entire brief of appellants was devoted to setting forth those instances. Judge Feinberg has stated, "... we agree with Judge Lumbard that appellants' other challenges to the trial court's conduct have no merit" (Slip op. 5034). But Judge Lumbard has stated only that the panel is in agreement that the other incidents "... do not require remedial action" (Slip op. 5025). The opinions, unfortunately, mention nothing further about the appellants' claims respecting the trial judge's hostility and bias during the course of the trial. There is also no resolution of the apparent ambiguity between the statements of Judges Lumbard and Feinberg. In this Petition, we do not, of course, wish to invite a final and unfavorable resolution of that ambiguity. But we would be less than candid if we did not register, once again, our position that the court's supervision of the summations was just one, albeit a major, aspect of a continuous course of bias and hostility. Therefore, despite the Court's determination that our other claims in that respect have fallen short of the mark, we respectfully request that the Court reexamine its view of the judge's conduct before the summations. Such a review, we believe, would be aided by the oral argument of counsel and, accordingly, we hereby request permission to argue this Petition before the panel.

APPENDIX

The same combative stance by the court was shown once again when counsel for Matanic, in the course of urging that Busic was the "leader" and Matanic "really had no say", argued that Captain Carey "testified to that....Petar would go up to him [Busic], and Zvonko would say go away. I haven't time to talk to you" (T. 5621). Once again, without even an objection by the government, the court interrupted and told the jury that counsel was making a statement unsupported in the record (T. 5621-22). In fact, the argument was fully supported in the record (T. 1554, 1693). Once again, the jury was left with the impression that Matanic's defense was so paltry, that counsel had to resort to manufacturing evidence and was therefore arguing improperly. ^{44/}

44/ In contrast, statements and arguments by government counsel which were, in fact, unsupported in the record were never once corrected by the court and, because of the agreement concerning objections, went unfettered to the jury. Throughout his summation, the Assistant repeatedly staged conversations involving the defendants and the passengers or crew in such a way as to falsely portray them as venal or perverse people (see, e.g., T. 5292, 5294-96, 5297-99, 5300-01, 5312-15, 5318-19). The court did not interrupt, however.

Evidence was misstated but the court simply listened. For example, government counsel misstated the evidence when he argued that Julienne Busic "introduced" the hijackers to Thomas Van Dorn, the steward. With that false statement as a backdrop (which was corrected by the court [T. 5480], counsel then staged the following non-existent scene:

"Now, Tom, Tom Van Dorn, this is Petar. He's a very nice fellow. Just behave yourself and everything will work out fine. This is Frane. He's going to be in the back now, holding the bomb. Don't worry. He's under control. This is Mark, Mark Vlasic, he's a very very sweet fellow. And he'll be in the back, too, with Frane. Now, please don't be upset because everything is going to be all right." (T. 5297)

Aside from everything else wrong with it, Thomas Van Dorn had not even been a witness in the case. The Assistant argued that Matanic stood up before the announcement and that he had a tear gas gun in his pocket when, in fact, he did not (T. 5295) and that he intimidated the passengers with it when, in fact, none saw it (T. 5353). Moreover, the Assistant utterly distorted Matanic's testimony as to what Busic had said to him outside the cockpit (compare T. 5402 with T. 2949-50). The court, however, never interrupted. Finally, the Assistant improperly used Busic's confession as evidence against Matanic and Pesut. (*Infra*, at 57).

interrupt the Matanic summation more than 40 times and the summation for Pesut more than a dozen times. This was improper, was not equal treatment, and, regrettably, cannot be overlooked.

Moreover, the court's supervision of the summations was doubly biased. Not only were the defense summations cut to ribbons;^{50/} the government's summation was permitted to go unfettered to the jury despite its impropriety and despite this court's repeated cautioning against such misconduct. See, e.g., United States v. White, 486 F.2d 204 (2d Cir. 1973), cert. denied 415 U.S. 980 (1974); United States v. Bivona, 487 F.2d 443 (2d Cir. 1973).

Under the court's supervision, government counsel was permitted to argue that Matanic carried the tear gas gun up and down the aisles, despite the fact that there was no evidence of that at all (T. 5295-96, 5353, 5416). The assistant argued that Matanic had admitted to a passenger that he had helped carry the fake explosives through the security system (T. 5359), when in fact, the ultimately clarified testimony of Noreen Collins (T. 4817-18) did not amount to that at all. Counsel for the government ridiculed Matanic's testimony as "rehearsed" (T. 5404); that he was part of a "four way fooling process" (T. 5405); that Matanic was trying to "fool" the jury and continue a "hoax" that began on the plane (T. 5405-06); and that the jury was being asked to "swallow" (T. 5407) "Mr. Matanic's whole act" (T. 5409). He ascribed to Matanic "the unmitigated gall in trying to tell you something that's diametrically, 180 degrees different from what really happened" (T. 5415-16).

^{50/} Infra, at 42-52.

Pesut, who the assistant sarcastically referred to as "this poor chap" (T. 5416) or "poor Mr. Pesut" (T. 5419) fared no better under the court's non-supervision. Pesut was also portrayed as having planned his testimony ("some stuff") with his codefendants in advance of trial (T. 5426). On one aspect of Pesut's testimony, the assistant argued: "That's his explanation to you. That's what you call trying to slip and slide" (T. 5427).

Finally, and once again under the court's supervision, the assistant made use of Basic's statements to Agent Strand in such a way as to suggest to the jury, improperly, that Basic's statements were evidence against Matanic and Pesut (see, e.g., T. 5355-57, 5445, 5754).

c. The Exclusion of Testimony

We have set forth in the statement of facts the numerous instances where the court either derided or curtailed defense evidence. But there were other instances where the court was called upon to exercise its discretion concerning significant blocks of evidence. In every instance, the court exercised its discretion in favor of the government's position.

Thus, the court excluded Dr. Diamond's testimony despite not only its importance to Zvonko Basic's defense (see Brief for Basic, Point II) but to Matanic and Pesut as well. Dr. Diamond would have buttressed their testimony that Basic, a secretive person, had not told them of the hijacking in advance (see footnote 9a, infra).

In this role as the exclusive judges of the facts, you are, each of you, shortly to ~~assume~~ ^{assume} a role similar to that of the ancient kings, whose word was law, ~~who decided questions of life and death.~~ ^{When you return your verdict it will be the most important day in Peter Matanovic's life; now and forever.}

Soon my task shall be completed, and you will have the full responsibility of fulfilling your oaths as jurors to try the issues here well and truly. And nobody will nor can release you of that responsibility. Not Judge Bartels, not the President of the United States. ~~Peter Matanovic awaits your judgment.~~ ^{it}

~~Now the United States of America in their majesty and wisdom demand that a person charged with a crime have the strongest and boldest defense possible, just as the United States of America want the boldest and ablest possible prosecution, so that truth may be discovered and there will be no miscarriage of justice rendered in the name of the citizens of our country.~~

The result of this trial, either conviction or acquittal, is immaterial to the ~~United States of America~~ ^{Government.}, for the citizens of our country and the prosecutor are victorious not when a man is convicted, not when one of their citizens goes to jail, but when justice is done. ~~Even an~~ acquittal, if it is just and true, is a victory for the citizens. And that is what your oath requires of you--justice, truth, not conviction, not even acquittal.

And ~~the citizens of the United States again in their~~ ^{your law, in its} majesty and wisdom have ~~legislated~~ ^{requires} that the ~~prosecutor~~ ^{government} must prove all the elements of the crime charged to your satisfaction beyond a reasonable doubt or there ~~can be~~ no conviction. Reasonable doubt. There's a common phrase you've heard hundreds of times. Idle words before, perhaps, but they are not idle words here. Peter Matanovic needn't ~~say a word in his own defense.~~ ^{put in a defense at all.} Rather, Peter Matanovic is cloaked ~~by~~ ^{and} a mantle--he is presumed to be as innocent of this crime as you ^{are}. And that ~~mantle~~ ^{presumption} of innocence cannot be

PROOF OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LAURA ROGER , being duly sworn deposes
and says:

1. I am over 18 years of age and am not a party to this action.

2. On November 27 1978, I served the
Petition on Behalf of Appellants Frane Pesut and Petar Matanic for
foregoing Rehearing and Suggestion for Rehearing In Banc upon

all counsel in this action

two (2)
by depositing/ ~~but~~ true cop[ies] thereof in an official
depository under the exclusive care and custody of the United
States Postal Service located at 120 Wall Street New York, New York,
each enclosed in a postpaid wrapper, which wrapper[s] ~~was~~
[were] addressed as follows:

Honorable Edward R. Korman
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Pierce O'Donnell, Esq.
Beardsley, Hufstedler & Kemble
Suite 2220
Crocker Bank Plaza
611 West Sixth Street
Los Angeles, California 90017

Sworn to before me this
27th day of November 1978.

Notary Public

RICHARD B. MARTIN
Notary Public, State of New York
No. 01000000000000000000
Qualified in Westchester County
Commission Expires March 30, 1979